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NO. 80-5605

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

CARL ELSON SHRINER,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

RESPONSE OF RESPONDENT STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

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-vs-

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RESPONSE OF RESPONDENT, STATE OF FLORIDA
IN OPPOSITION TO PETITION FOR CERTIORARI

TO: THE HONORABLE, THE CIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

QUESTIONS PRESENTED

I. WHETHER THE STATE SCRUPULOUSLY HONORED PETITIONER'S FIFTH AMENDMENT RIGHT TO CUTTING OFF QUESTIONING PURSUANT TO THIS COURT'S DECISION IN MICHIGAN V. MOSLY, 423 U.S. 96 (1975), WHERE, AFTER APPROXIMATELY EIGHT HOURS OF INTERMITTENT INTERROGATION, PETITIONER REQUESTED QUESTIONING CEASE ON A SPECIFIC TOPIC AND THE INTERROGATION STOPPED FOR A MINUTE OR TWO AND THEN RESUMED WITHOUT ADDITIONAL MIRANDA WARNINGS OR THE EXECUTION OF THE MIRANDA WAIVER?

II. WHETHER THE IMPOSITION OF THE DEATH PENALTY BASED ON THE CONSIDERATION OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE WHERE NO MITIGATING CIRCUMSTANCES EXISTED IS ARBITRARY AND CAPRICIOUS AS APPLIED HEREIN AND CONSTITUTES A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS' BAN ON CRUEL AND UNUSUAL PUNISHMENT?

III. WHETHER THE TAKING OF PETITIONER INTO CUSTODY FOR QUESTIONING BASED ON A BOLO REPORT AND COMPOSITE DRAWINGS PROVIDED POLICE OF A ROBBERY SUSPECT VIOLATED DUNAWAY V. NEW YORK, 442 U.S. 200 (1979)?

IV. WHETHER UNDER THE "TOTALITY OF THE CIRCUMSTANCES" THE CONFESSION OBTAINED HEREIN SHOULD HAVE BEEN SUPPRESSED PURSUANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

PARTIES

In the Florida Supreme Court, Petitioner, Carl Elson Shriner, was the Appellant and the State of Florida was the Appellee.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS . . . . . iii-iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 11

POINT I 11

POINT II 17

POINT III 21

POINT IV 23

CONCLUSION 25

CERTIFICATE OF SERVICE 25

TABLE OF CITATIONS

Biddy v. Diamond,
516 F.2d 118 (5th Cir. 1975) 15

Clewis v. Texas,
386 U.S. 707, 18 L.Ed.2d 423 (1967) 23, 24

Dunaway v. New York,
442 U.S. 200 (1979) 21, 22

Frazier v. Cupp,
394 U.S. 731 (1969) 24

Hargrave v. State,
366 So.2d 1 (Fla. 1978), cert. den. 62 L.Ed.2d 176 (1979) . 18 - 20

Lockett v. Ohio,
438 U.S. 586 (1978) 20

Michigan v. Mosley,
423 U.S. 96 (1975) 11, 14, 161, 17

Miranda v. Arizona,
34 U.S. 436 (1966) 11, 12, 15, 16

Nash v. Estelle,
597 F.2d 513 (5th Cir. 1979) 15

Proffitt v. Florida,
428 U.S. 242 (1976) 18

Shriner v. State,
386 So.2d 525 . . . . . .1, 17

Spinkellink v. Wainwright,
578 F.2d 582 (5th Cir. 1978)
cert. den. 440 U.S. 976 (1979) 20

Thompson v. Wainwright,
601 F.2d 768 (5th Cir. 1979) 15

United States ex rel Henne v. Fike,
563 F.2d 809 (7th Cir. 1977) cert.den. 434 U.S. 1072 16

United States v. Paulton,
540 F.2d 886 (8th Cir. 1976) 16

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida sought to be reviewed is reported as Shriner v. State, 386 So.2d 525 (Fla. 1980). The Petition for Rehearing filed in said cause was denied August 27, 1980.

JURISDICTION

The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(3) to the extent that the Petition presents a substantial federal question entitling this Court to exercise its lawful jurisdiction.

CONSTITUTIONAL PROVISIONS

Respondent would accept as outlined by Petitioner those statutes involved in the instant pleadings.

STATEMENT OF THE CASE

Respondent does not accept the statement of the case presented by Petitioner in that Petitioner has presented the facts in a light most favorable to Petitioner, contrary to the general priniciples that the facts presented to this Court must be viewed in the light most favorable to the State and the disposition of the case. Respondent would invite this Court to review the Statement of the Facts presented by the Florida Supeme Court in its rendition in Shriner v. State, supra, and would add the following facts for further clarification.

Petitioner was first stopped and taken into custody by Deputy William Denson. Deputy Denson was called by the defendant and on direct examination, inter alia testified as follows:

Q. I call your attention to October 23, 1976. On that particular day were you so employed as a police officer?

A. I was.

Q. Are you familiar with a person by the name of Carl Elson Shriner?

A. I am.

Q. Do you see Mr. Shriner here today?

A. I do.

Q. Can you please tell me briefly how you came in contact with Mr. Shriner on that particular day?

A. I had received a bulletin from our department with reference to a suspect in an armed robbery and murder.

Q. Where did you receive the bulletin?

A. From our patrol squadroom. Each officer was issued a three page bulletin.

Q. You received it where?

A. From our department.

Q. Can you please briefly explain what that process is about receiving it?

A. In our squadroom in our squad meeting before we go to work, we are given certain information about occurrences that have happened while we were off duty. One of these things was a three page bulletin, two composites and a written physical description of a suspect.

Q. Okay. As to any particular offense?

A. Armed robbery and murder.

* * *

Q. Then can you just, please, briefly explain how you became involved with Mr. Shriner.

A. Approximaely 4:20 that afternoon, I was parked on Northeast Ninth Street facing south at the stop sign awaiting traffic to clear, so I could turn and and go east on Twenty-Third Avenue. A white over maroon Chevrolet drove by in front of me as I was waiting at the stop sign. The passenger turned and looked straight at me. The passenger in that car bore such a striking resemblance to the composite and especially to the written description of the suspect that I turned and pursued the vehicle and stopped it on Main Street after it turned south.

* * *

Q. After stopping the car what did you do?

A. I proceeded to initiate our--what we call our field interview card. It's a card that we send on to our investigators reference anything we encounter on the road. I interviewed the driver.

Q. Who was the driver?

A. I velieve his name was John Rapp. I filled out the interview card on him and asked the passenger to step back, the one I said matched the composite that I had. When he came back to me I asked for some identification. He produced a Florida dirver's licence.

Q. Was that a proper Florida Driver's License.

A. Yes, sir, as far as I could tell. At that time I told him exactly why I had stopped him, advised him of his rights pursuant to the Miranda decision, and proceeded to initiate the field interview card.

Q. Okay. Did this person at this time offer you any resistance.

A. He did not.

Q. And you said you did advise Mr. Shriner of certain Miranda warnings?

A. I do, sir.

Q. Are these the Miranda warnings usually printed on a card?

A. Yes, sir. I read the card to him and offered him the card to read for himself and aksed if he understood those rights.

Q. Okay. And after you read him his rights, what did you do with Mr. Shriner?

A. I continued to fill out the interview card, his name, his present address. In the slot in our card for business or school I asked him what his business was. He told me he was unemployed. I asked him what he normally did for a living. He told me -- I believe he commented, "Well, nothing. I just got out of prison." I inquired for what reason. He said he had been in prison for armed robbery in Miami, Florida.

On cross-examination by the State, Deputy Denson continued his testimony.

Q. Deputy Denson, do you have with you the BOLO or information supplied you from the squadroom?

A. Yes, sir, I do.

Q. Do you have it in your possession?

A. Yes, sir.

Q. Would you produce, please, for the Court the information that you received at the squadroom on October 23 prior to seeing the Defendant.

A. Yes, sir. (Witness produces document)

* * *

Q. Now, Deputy Denson, were you given any information as to who had made these composites?

A. We were told one composite was made by the victim of the robbery on Thirty Ninth Avenue in the city. The other one was made by the victims of a robbery a the 8 Days Inn, at the Interstate of Newberry Road.

Q So this was eye witness composites?

A We were told they were both eye witness composites of the two separate victims.

Q Now, were you given this BOLO with any information as to the weight, height, of this person that was listed on the BOLO?

A Yes, sir. On the cover sheet of the two composites is a physical description of which I had on my clipboard beside me as I drove and, as a matter of fact, when I stopped Mr. Shriner, I produced this particular piece of paper and showed it to him and read from it to explain why I had stopped him.

Q Tell me what you read to him and what his comments were when you read that description to him.

A As I explained to him that I had stopped him because he resembled a suspect we were looking for. I said, 'The suspect is a white male, five foot eight to five foot ten inches tall.' And he nodded his head to me.

A Nodded up and down?

Q Yes, sir. He nodded in the affirmative. I said, 'Approximately one hundred and fifty pounds with dark hair, collar length and flips on the end.' At that point I reached up and turned his head and he nodded again at me.

A What did you see when you turned his head?

Q His hair flipped up at the end. It was dark, collar length. I said, 'He's in his mid-twenties, pock marks ...' I saw no pock marks visible, '...but with a pale or fair complexion and sharp facial features.' And he did indeed, have an extremely fair complexion.

A Did he make any comments or ...

Q He nodded his head again to that and I said, 'And has a short trimmed goatee.' I was still reading from the composite. At taht he said, 'It's not short trimmed. I just started growing it.'

A Did that call anything to your attention.

Q One of the witnesses--we were told, I do not have it in writing, but I was told at the squad room, that one of the witnesses did, indeed, say the goatee was either close trimmed or had recently begun."

The trial court denied the Motion to Suppress Evidence based on an illegal arrest finding that, while there had been an arrest made, the composite and description of the Petitioner provided the probable cause necessary to support his arrest.

Search and Seizure of Physical Evidence

The motion hearing continued, and Deputy Denson explained that after depositing Petitioner at the Sheriff's office, he went to a residence located at 1223 N.W. 18th Avenue, Gainesville, which was rented by John Rapp, and was also the present address given by Petitioner. Deputy Denson went to the residence to assist in a search.

Meanwhile, Deputy Sergeant James R. Murray had taken over the questioning of Petitioner at the Sheriff's office. Murray had previously been assigned and was working the two robbery cases in question, and had been responsible for compiling the written description and composite. Prior to questioning Petitioner, Murray was informed by Officer McManus that Petitioner had been given his Miranda rights, and that Petitioner had executed a waiver of attorney.

Deputy Murray began questioning Petitioner about 5:00 p.m. and explained to Petitioner that he was under arrest for the robbery of the 8 Days Inn. Petitioner told Murray tht he was from Phoenix, Arizona. This was significant because the perpetrator of the robbery had written "514 West Buist Street, Phoenix" on the hotel registration form. Subsequently, Phoenix police had verified that a family named Shriner lived at that address.

After thirty minutes or so, Murray requested that Petitioner consent to a search of that portion of the house Petitioner lived in. Petitioner was occupying a room inside the residence with a lady named Carol Griffis, and the residence was rented by John Rapp. Petitioner executed the Waiver of Search, and immediately Deputy Murray contacted the officers, already at the residence, that Petitioner had consented to a search of his "portion of the house".

The officers had already entered the residence and gone into and looked around Petitioner's room prior to the Murray notifyin them of Petitioner's Waiver of Search. The officers had entered the residence with the consent of John Rapp and eventually discovered a .38 caliber revolver on a chair under some clothes belonging to the Rapps'

children in the Florida room near where the children slept. In the bedroom shared by Petitioner and Carol Griffis, an ammo pouch containing .38 caliber bullets was found in a chest of drawers. During the search, Ms. Griffis passed out and was taken by emergency vehicle to the hospital.

At this point in time, the trial court denied the Motion to Suppress Evidence based on Unreasonable Search and Seizure, finding that Petitioner lacked standing to suppress the evidence and that the consent to search Petitioner's portion of the residence had been freely and voluntarily given.

Voluntariness of Confession

Almost immediately upon stopping the Petitioner, prior to any interrogation, Deputy Sheriff Denson "Mirandized" the Petitioner. Deputy Denson testified at trial:

> Okay. Tell me what it was that occurred when you first stopped the defendant before the Miranda warnings.
>
> I stopped him with the intent to initiate what we call a field interview card. I asked him for some identification which he produced, and I then asked the questions that are listed on that field interview card.
>
> All right. And what questions are on the field interview card.
>
> Well, what we consider routine questions, his name, his home address, his business, his occupation, his social security number.
>
> All right.. Did you ask him about his business or occupation.
>
> Yes. I did.
>
> And what did he respond?
>
> MR PARKER: I would object to the question. I believe that Mr. Denson testifed at the time of the questioning on the field contact that the defendant had not been Mirandized.
>
> MR. HEBERT: Your honor, this is not-- may we approach the bench?
>
> THE COURT: Yes.
>
> (Discussed at the bench)

THE COURT: Objection sustained.

BY MR. HEBERT:

Q. As a result of the conversation that you had with the defendant, what did you do with him?

A. I advised him of his Miranda rights, advised him that he would have to accompany me to our station for an interview by one of our criminal investigation division officers.

Q. How did you advise him of his Miranda rights?

A. I read his rights from a card that we are furnished by the department.

Q. Do you have that card with you?

A. Yes.

Q. --that you read to the defendant?

A. Yes. (exhibiting)

Q. There are two sides to a card. Did you read both sides to the defendant?

A. No, sir. I read the side that is marked Miranda warnings.

Q. Read to the jury what you read to the defendant.

A. I read to him: "You have the right to remain silent. Anything you say can be and will be used against you in a court of law.

You have the right to talk to a lawyer and have him present while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish.

If you decide at any time to exercise these rights, and do not answer the questions, you may do so."

I then asked him if he understood each of these rights and he said he did. I then asked him if he would mind continuing to talk to me and he said that he did not mind. I then offered him the card to read for himself.

Again, Petitioner was "Mirandized" upon being taken to the Alachua County Sheriff's Department at 5:06 in the afternoon by Criminal Investigator John McManus of the Sheriff's office. Officer McManus testified at trial to "Mirandizing" the Petitioner at his arrival at the Criminal Investigation Department of the Alachua County Sheriff's Office at 5:06 in the afternoon as follows:

Q. Did you have occasion to see Carl Elson Shriner, the defendant, on that date and at that time and place I have indicated.

A Yes, I did.

Q Let me show you this instrument and ask you if you can recognize what it is.

A This is a standards -- a standard rights form that we utilize at the sheriff's office.

Q Did you utilize that form with this defendant Shriner?

A Yes, I did.

Q There are some--excuse me. Does this form fairly and accurately, in its present condition portray what was on the form when you met Mr. Shriner at the sheriff's office?

A Yes, it does.

Q There is both printed matter and written matter?

A Yes.

Q And there are some signatures?

A Yes.

Q Who put the signatures on that form?

A The signature of Carl E. Shriner was put on the form by Mr. Shriner.

Q Did you give the defendant a chance to read the printed material or read it to him.

A Yes. We read it together.

Q Did he put his signature there before or after he read the printed words?

A After each individual paragraph was read, I asked him if he understood it and he indicated 'Yes.' I said, 'Would you please write yes, you do understand what you did.' I said, 'Would you please sign your name if you do understand that portion of your rights,' which he sighed his name to it to indicate that he did understand that portion.

Q All, right. Now, the form contains one, two, three, four signatures of Carl E. Shriner. Did he sign all of those four?

A Yes, he did.

MR. HEBERT: Your Honor, at this time I move into evidence State's Exhibit No. 17, the form identified as the standard Miranda warnings.

MR. KEARNS: We will object to the introduction of the document, Your Honor.

THE COURT: Objection overruled. File it as State's Exhibit --

MR. HEBERT: 17.

THE COURT: -- 17.

[The document last above referred to was received in evidence as State's Exhibit No. 17.]

MR. HEBERT:

Q What is the information contained at the top of the form?

A This was the place that the document was executed, which was at the Alachua County CID. That stands for the Criminal Investigation Division of the Alachua County Sheriff's Office. It also has the date, which is 10/23/76, and the time which is 1706 military time which makes it 5:06 p.m. in the afternoon.

MR. HEBERT: All right. Your Honor. I would like to publish this piece of evidence.

THE COURT: All right.

BY MR. HEBERT:

Q Would you read from State's Exhibit No. 17 what was read to the defendant.

A I wrote the name Carl Elson Shriner which is printed at the top. At that time I did not know the charge on him and i left that portion blank.

Sgt. Murray wrote it here 'robbery'.

It says: 'Carl Elson Shriner, you are under arrest, charge with' and I explained to Mr. Shriner at that time that he was under suspicion of a crime being investigated by another officer.

Before we ask you any questions, you must understand what your rights are.

You have the right to remain silen. You are not required to say anything or answer any questions. Anything you say can and will be used against you in a court.

Then there is the printed matter of 'Do you understand that?' 'Yes' written by Mr. Shriner, and then the signature of Mr. Shriner.

The second paragraph: 'You have the right to talk to a lawyer for advice before being questioned and you have the right to have him with you while you are being questioned. If you cannot afford to hire a lawyer, one will be provided for you.' Again, 'Do you understand that?' Yes, written by Mr. Shriner and then the signature of Mr. Shriner.

If you want to answer questions now without a lawyer present, you still have the right to stop answering at any time. You also have the right to stopy answering at any time that you wish to talk to a lawyer-- want to talk to a lawyer. Then we have, 'Do you understand that?' and again, 'Yes' written by Mr. Shriner and signed by Mr. Shriner.

The last paragraph, which is headed 'Waiver' says: 'I have read or had read to me that statement of my rights as stated above. I understand what my rights are.

I am willing to answer questions and make a statement.

I do not want a lawyer at this time, although I understand that I can have one.

No promises or threats have been made by anyone to cause me to make a statement.

I have not been mistreated or harmed by anyone to cause me to make a statement.

Again, it is signed by Mr. Shriner, witnessed by myself, and also by Investigator Dennis Nicholson, who is a crime scene investigator.

Q. Deputy McManus, the waiver that you read, it says, 'There was no force or threats.' Did you, in fact, try to force or threaten Mr Shriner to sign this in any way?

A. No.

Q. Did you offer Mr. Shriner any reward or hope or reward to sign this document.

A. No.

Q. Did anyone in your presence do that?

A. No.

Petitioner was again "Mirandized" at approximately 9:17 p.m. on the same date by Detective Sergeant Jesse Blitch of the Gainesville Police Department when Petitioner was advised of his rights and sighed a waiver of rights as follows.

Q. All right. This form which you have just handed me has certain printed words on it, to wit: 'I have the right to remain silent, cannot be foreced or coerced in any way of manner to submit to this test or be required to answer any questions; that anything I say can be used in evidence against me in a court of law; that I have a right to an attorney, either retained by me or appointed by the Court if I cannot afford to hire an attorney and I have the right to talk to such attorney before saying anything or taking this examination and further that I have the right to have that attorney present with me during this examination or any interview. If I decide to answer questions now and waive my right to first talk with an attorney or have my attorney persent with me during questioning, I will have the right to stop answering at any time until I talk to my attorney. Being fully aware of and understanding what my rights are, I knowingly and voluntarily waive my foregoing rights and hereby consent and agree to this examination. Absolutely no threats or promises or inducements of any kind have been made or offered to me.' Then there is a signature that sayd Carl E. Shriner. Who placed that signature there?

A. Mr. Shriner.

REASONS WHY THE WRIT
SHOULD NOT BE GRANTED

I.

Petitioner asserts that the Florida Supreme Court erred in finding that the trial court did not violate his right to cut off interrogation pursuant to this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966) and Michigan v. Mosley, 423 U.S. 96 (1975). Petitioner asserts: "The Florida Supreme Court misapplied the tests laid down in Michigan v. Mosley, supra, and failed to recognize critical distinctions in the facts of Mosley." [Petitioner's Petition 31].

The Florida Supreme Court in addressing Petitioner's claim that a violation of this Court's decision in Miranda v. Arizona, supra, had occurred, concluded that the dictates of Michigan v. Mosley that a defendant's right to cut off questioning must be scrupulously honored was, indeed, honored in the instant case. After a lengthy recital of the testimony regarding Petitioner's desire to cut off interrogation, the court observed:

> Appellant testified in his own behalf at the motion to suppress but made no mention of any desire to terminate questioning.
>
> We are satisfied that, based on Mr. Nilon's testimony and the absence of rebuttal evidence to the contrary, the trial judge correctly concluded that Appellant wanted to terminate questioning only insofar as it related to the Eight Days Inn robbery. We are similarly satisfied that Mr. Nilon respected Appellant's partial exercise of his Miranda privilege and restricted further questioning to other areas. Given this posture, the police did not run afoul of Miranda and Mosley by continuing the interrogation:
>
> When a person in custody has responded to proper police interrogation by voicing a general willingness to talk subject only to a limited desire for silence and his wishes not to discuss a particular subject matter area are respected, nothing rooted in law or constitutional policy makes it improper to question him as to any unlimited subject. United States v. Vasquez, 476 F.2d 730, 732-733 (5th Cir. 1973), Accord, Smith v. United States, 505 F.2d 824 (6th Cir. 1974) United States v. Matthews, 417 F.Supp. 813 (E.D. Pa.) affirmed 547 F.2d 1165 (3 Cir. 1976) cert.den. 429 U.S. 1111, 97 S.C. 1148, 51 L.Ed.2d 565, (1977). Hence, Appellant's confession was properly admitted at trial.

[386 So.2d at 532].

The record reflects that from the time Petitioner was first taken into custody at approximately 4:20 p.m. on October 23, 1976, until he confessed to the robbery/murder of the Majik Market clerk shortly after midnight on the same day, Petitioner had been given his Miranda warnings fully and completely at least three times. Petitioner argues that because on one occasion during the interrogation, the Petitioner indicated that he did not wish to answer a question that total interrogation should have ceased and the confession that was subsequently obtained was obtained in violation of Miranda v. Arizona, supra.

At the Motion to Suppress hearing, Assistant State Attorney Nilon, one of the interrogators of Petitioner at the time his confession was given, testified that Petitioner never requested that interrogation cease, but rather, only refused to answer a question on a particular subject. The record reflects:

> Q. During any of that period of time that you were in his presence did he ever ask to have an attorney present?
>
> A. No, sir, he did not.
>
> Q. Did he ever ask to stop talking or remain silent?
>
> A. Yes, to a certain extent. What he did, in the first conversation that I had with him after Investigator Blitch had left the room, particularly in reference to the 8 Days Inn robbery, he told me certain things that had happened in the 8 Days Inn robbery and when I asked him particularly about the gun that he used in the 8 Days Inn robbery he said to me something to the effect, 'Well, right now it's like I'm crazy. It's like I'm nuts.' I said, 'Well, Mr. Shriner, ...' I don't remember what I said, but I said, 'It's not like you mean you are insane.' He said, 'No.' I said, 'You mean you don't want to answer any more questions?' And he said, 'Yes'. I just sat there for a minute. I think at that point I asked him something about his family background and he answered that, and that's the only time I can think of he even alluded to the fact that he didn't want to answer any questions or make any further statements or anything.
>
> Q. Were there any promises or threats on your part to get him to make any of the statements he made?
>
> A. No sir.
>
> Q. Did you offer him any deal if he would make those statements?
>
> A. No deal. * * * [Motion to Suppress hearing 100-101]

and on cross-examination:

Q. All right. Let me go back to one of the statements that Mr. Shriner is giving-- and it was kind of at the end of Mr. Hebert's direct examination--you said that during one of the times you were talking to Mr. Shriner concerning the weapon or the gun, he made the statement to you something about, 'I'm crazy' or 'Stop. I'm crazy'.

A. Yes, sir.

Q. Kind of vague. We are not sure as to the terminology that was used. The word crazy was used, though.

A. Crazy or nuts. 'Its like I'm crazy or nuts.' And I interpreted that to mean, 'It's like I'm not really nuts, but for your sake and, you know, in answering these questions, further questions, it's like I'm nuts to you.'

Q. Was he saying he was just getting confused or tired?

A. My impression was that he was saying, like, from now on out as far as concerning the gun and the specifics of the 8 Days Inn robbery, it was like he was insane, that, you know, the answers should be like a crazy man. I got the impression he was saying, 'Don't bother asking me any more questions about that.'

Q. I believe you said on direct examination-- did he say, 'I don't want to answer any more questions'?

A. He never told me specifically like, 'I don't want to answer any more questions,' that I can remember.

Q. Did you get the impression he didn't want to answer any more questions?

A. About that part of the incident, yes, about the 8 Days Inn and where he got the gun and things of that nature and any more specifics, ues, but then we sat there for a minute or two and I asked him some other questions. I think it was about his personal . . .

Q. About his family and personal things.

A. Yes, and he just answered and we started another conversation and he had no problem.

Q. At that point he started saying, 'I'm crazy, I'm nuts' or whatever it was he tried -- the point he was trying to get across to you and the fact that he seemed to want to stop answering questions in that area, did you advise him at that point in time about his rights to an attorney.

A. No, sir. [Motion to Suppress hearing, 107-108]

Clearly, the question before the Florida Supreme Court and the question herein is whether Petitioner's right to cut off interrogation had been violated when he indicated that he did not want to discuss certain topics during interrogation. While it is quite clear that this Court in Michigan v. Mosley, supra, held that Miranda requires that police interrogation cease when a person in custody indicates he wishes to remain silent, said decision does not set forth a per se proscription of indefinite duration upon any further questioning by any police officer at any time or place on any subject or imposes a blanket prohibition against the taking or the admission in evidence of voluntary statements. In Michigan v. Mosley, police questioning was held proper ever though the accused had earlier indicated his desire to remain silent. There this Court rejected a strict rule which would totally preclude all further custodial interrogation. At the same time it was observed that to construe Miranda to require only the immediate secession of questioning would permit a resumption of interrogation after a momentary respite, which would undermine the will of the accused.

> Clearly, therefore, neither this passage not any other passages in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject once the person in custody had indicated a desire to remain silent.
>
> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his rights of silence and to assure that the exercise of the right will be scrupulously honored. . ." 384 U.S. at 479 [86 S.C. at 1630]. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Id. at 474 [86 S.C. at 1628]. Through the exercise of this option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of the statements obtained after the person in custody has decided to remain silent depends, under Miranda, on whether his "right to cut off questioning" was "scrupulously honored."
>
> [423 U.S. at 102 - 104] (footnotes omitted)

In the instant case, Assistant State Attorney Nilon testified that the Petitioner did not exercise his right to cease interrogation but rather sought to control the subject matter of the interrogation. As indicated by the Florida Supreme Court in its opinion, Petitioner at no time at the Motion to Suppress hearing ever indicated that he wished to terminate interrogation.

Petitioner further argues that assuming for the moment, that the right to cut off interrogation was properly limited to questions regarding the robbery at the 8 Days Inn, at the very least Assistant State Attorney Nilon should have re-read Petitioner's Miranda warnings to him at that stage before interrogation resumed. Citing to Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979), Petitioner argues.

> Such an inquiry should have been coupled with fresh Miranda advices, as in Michigan v. Mosley, supra, and further interrogation should not have proceeded in the absence of a clear and intelligent waiver. [Petitioner's Petition 37]

Respondent would urge that Petitioner has failed to come forth with any case authority which would require the need for repeated Miranda warnings where in the instant case on three separate occasions during the interrogation, Petitioner was given full Miranda warnings. Petitioner's reliance on Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979) and Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) is misplaced in that in both those cases the given defendants sought assistance of counsel and further interrogation was held inappropriate in that while an interrogator may seek clarification of the accused's wishes to remain silent or have counsel present, the interrogation cannot continue until the assistance of counsel has been provided. In Biddy v. Diamond, 516 F.2d 118 (5th Cir. 1975), the Fifth Circuit Court observed:

> The critical legal question is whether the overall activity of the police sufficiently comports with the requirements concerning the Miranda warinings to insulate the conduct and admissions against suppression.
>
> It is clear that when a person knows her rights and has even exercised the right to counsel, talking with counsel, later a voluntary admission can constitute a waiver of the rights to counsel and to remain silent. [citation omitted] The question is whether is

> the full Miranda warnings were required on December 27 and 28, even though in response to police question, Petitioner expressly stated that she remembered her rights as previously explained to her. We think not. We have previously held that "there is no requirement that an accused be continually reminded of his rights once he has intelligently waived them." United States v. Anthony, 474 F.2d 770, 773 (5th Cir. 1973). A great many courts, state and federal, have likewise held that repeated warnings are not necessary to a finding that a defendant, with full knowledge of his rights, knowingly and intelligently waived them. [citations omitted].
>
> We think that a further delineation on December 27 of Petitioner's rights which she had stated that she understood from prior explanations, would have been needlessly repetitious. The District Court was not clearly erroneous in finding that Mrs. Biddy fully understood her rights at the time she made the statement to her husband with the detectives present.
>
> The argument that the request for an attorney on December 15 effectively foreclosed the legality of the activity of December 27 and 28, is not compelling. A series of cases has held that even though an attorney is once requested or retained the right to an attorney can be subsequently waived.
>
> [516 F.2d at 122]

See, also, United States ex rel Henne v. Fike, 563 F.2d 809 (7th Cir. 1977) cert.denied 434 U.S. 1072, and United States v. Paulton, 540 F.2d 886 (8th Cir. 1976).

The record herein was not scrupulously disregarded but rather as required under Michigan v. Mosley, supra, Petitioner's wishes to discontinue interrogation about the 8 Days Inn robbery was honored. Inquiry regarding other aspects of the murder investigation which had also taking place did not fally within the scope of the limited cut-off of interrogation sought by Petitioner.

Petitioner takes some comfort in the fact that at a later point, inquiry was made regarding the 8 Days Inn incident. Petitioner did not, at that point after three Miranda warnings, seek to have the interrogation cease, but rather, continued to answer questions without exercising any of his rights pursuant to Miranda v. Arizona, supra.

The Florida Supreme Court's ruling that Petitioner's right to cut off questioning meets the "scrupulously honored" test set forth in Michigan v. Mosley, supra, is correct and does not present a claim meriting further review by this Court's certiorari jurisdiction.

II.

Petitioner next argues that the imposition of the death penalty herein based on the statutory aggravating factors contained in § 921.141, Fla.Stat. and "excluding consideration of non-statutoty mitigating circumstances" is arbitrary and capricious and constitutes a violation of the Eighth and Fourteenth Amendments' ban on cruel and unusual punishment. While at first blush, it would appear that Petitioner is challenging the correctness of the Florida statute in view of Lockett v. Ohio, 438 U.S. 586 (1978), Petitioner's real complaint is that the trial court and jury rejected potential non-statutory mitigating circumstances which he asserts herein were valid and should have been considered in light of the aggravating circumstances enumerated.

In a well-reasoned opinion, the Florida Supreme Court in Shriner v. State, 386 So.2d 525 at 533, 534 opined:

> The remaining issues involve the sentencing phase of the trial. Appellant's constitutional attack on the death penalty has been thoroughly canvassed in prior decisions and found groundless. Proffitt v. Florida, 428 U.S. 242, 96 S.C. 2960 49 L.Ed.2d 913 (1976); Alford v. State, 307 So.2d 433 (Fla. 1975) cert.den. 428 U.S. 912, 96 S.C. 3226, 49 L.Ed.2d 1221 (1976); State v. Dixson, 283 So.2d 1 (Fla. 1973) Cert.den. 416 U.S. 943, 94 S.C. 1950 40 L.Ed.2d 295 (1974). Equally meritless, is the contention that it was error to exclude the testimony of a priest who had witnessed an execution by electrocution. While it is settled that advisory jury and trial judge may consider evidence as mitigating factors beyond those enumerated in § 921.141(6),Fla.Stat.(1977), the evidence must be relevant to the sentencing inquiry. We do not believe that a descriptive account of an electrocution will aid the jury or judge in their efforts to apply § 921.141 fairly and

correctly. Indeed, such evidence would more than likely serve to distort and obfuscate the sentencing process.

Appellant contends finally that his death sentence is fatally defective because the judge considered non-statutory aggravating circumstances. . .

The court finds, with the possible exception of number six above, there are no mitigating circumstances in this case. An examination of the psychiatric evaluation in this case, found both in the pre-sentence investigation from the Department of Offender Rehabilitation and by the various psychiatrists appointed to represent this defendant prior to trial, he had been diagnosed as a "psychopathic personality". An examination of these reports, however, does not lead one to the conclusion that his capacities diminish thereby.

The court finds that the aggravating circumstances far outweight the mitigating circumstances.

In addition, an examination of the pre-sentence investigation, which was made available in its entirety, including the confidential section, to the attorney for the defense, prior to sentencing, indicates that during the defendant's incarceration at the Department of Offender Rehabilitation, he has presented a disciplinary problem and to some degree a security risk. The investigation further shows that he has engaged in a long pattern of violent criminal conduct. In addition, it is apparent that the robbery that was committed in the perpetration of the death of Judith Ann Carter was not the sole robbery committed by this defendant subsequent to his release from prison some three weeks prior to the date of the offense.

As a prelimiary matter, the record in replete with evidence to support the judge's finding of aggravating circumstances number two and four. The record also supports the finding of no mitigating circumstances. It is not clear, however, whether the judge considered Appellant's disciplinary record as an aggravating circumstance. Even if we assume that the disciplinary problem was so treated, the error was harmless. We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. Since death is presumed in this situation improper consideration of a non-statutoty factor does not render the sentence invalid . . . .

See, Proffitt v. Florida, 428 U.S. 242 (1976)

In Hargrave v. State, 366 So.2d 1 (Fla. 1978) cert.denied 62 L.Ed.2d 176 (1979), the Florida Supreme Court opined:

Returning to Appellant's argument that the trial court erred in failing to find the mitigating circumstances delineated above, we respond that the jury and the judge could have resolved the evidence in favor of Appellant's position, but neither was

compelled to do so. We are not here dealing with a case where either the jury or the court considered matters which it should not have considered or failed to consider matters it should have considered. Appellant simply disagrees with the force and effect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing. The trial judge conscientiously assessed the testimony of the experts and found that although there was some evidence of a personality defect in the defendant, and some possiblity of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the court finds that such capacity was not substantially impaired. (emphasis supplied). The trial judge further observed that Appellant is of average intelligence or possibly slightly less than average intelligence. It is apparent, then, that the trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it provided a sound basis for establishment of the statutory-mitigating circumstances.

The proposition that Appellant was under the domination of Karge is in the same posture. AlThough the defense psychiatrists offered evidence that Hargrave could be dominated, and although Appellant's mother testified that her son was dominated by Karge, the State psychologist who tested both Hargrave and Karge, concluded that Appellant "certainly played the dominant role." Certainly the jury and the judge who heard the testimony resolved the conflict against the Appellant.

[366 So.2d 5,6]

The Florida Supreme Court went on to say:

We come now to that part of our function of review under the State's death statute which is different from the scope of this Court's review in all of the proceedings. We are mandated by § 921.141(4), Fla.Stat. (1975) automatically to review not only the judgment of conviction, but also the sentence of death. As pointed out in Proffitt v. Florida, supra, the final review of sentence in this Court supplies the channelled discretion and deliberation necessary to avert the constitutional deficiences condemned in Furman v. Georgia, 408 U.S. 238, 92 S.C. 2726, 33 L.Ed2d 346 (1972). However, this Court's role is not and should not be to cast aside the careful deliberation which the matter of sentence has already received by the jury and trial judge unless there has been a material departure by either of them from their proper functions prescribed by § 921.141, Fla.Stat. (1975). Or unless it appears that in view of other decisions concerning imposition of the death penalty, the punishment is too great. State v. Dixon, supra.

> In the instant case, Appellant maintains there has been just such a departure by the trial judge in I. finding two aggravating circumstances arising out of the single act of attempted robbery (those set forth in § 921.141(5)(d) and (f), Fla.Stat. (1975)) II. finding that the capital felony was especially heinous, atrocious, or cruel; and III. failing to find the existence of three mitigating circumstances disclosed by the evidence. The asserted mitigating circumstances are: a. Section 921.141(6)(b)- defendant was under an extreme mental or emotional disturbance; b. Section 921.141(6)(f) -the defendant's capacity to conform his conduct to the requirements of law or appreciate the criminality of his act was substantially impaired; and c. Section 921.141(6)(e)- defendant was substantially dominated by another person.
>
> We deal first with the aggravating circumstances. Although Provence v. State, 337 So.2d 783 (Fla. 1926) condemns the doubling up of an aggravating circumstances of pecuniary gain each time a crime such as robbery is concerned, the mere recitation of both circumstances does not in all cases call for a condemnation of the sentencing hearing and judgement. As State v. Dixon,supra, teaches us, the statute does not comprehend a mere tabulating of aggravating versus mitigating circumstances to arrive at a net sum. It requires a weighing of those circumstances. Absent the circumstances of pecuniary gain, there were ample other statutory aggravating circumstances to place on the scale to weigh against the valid mitigating circumstances.

[366 So.2d 4, 5]

In the case at bar, the aggravating circumstances found to be applicable were substantiated by the evidence and as noted by the Florida Supreme Court in review of the sentence imposed, no mitigating circumstances, whether enumerated or non-enumerated were applicable in the instant case. See, Lockett v. Ohio, supra, and Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) cert.den. 440 U.S. 976 (1979).

III.

Petitioner next asserts that the arrest in the instant case bears a "striking resemblance" to this Court's decision in Dunaway v. New York, 442 U.S. 200 (1979) wherein "the court condemned the police practice of picking a person up for questioning on less than probable cause and taking him to the station house for custodial questioning." [Petitioner's Petition 49]. In Dunaway v. New York, supra, this Court held that custodial questioning on less than probable cause for arrest violated the Fourth Amendment and that any statements or evidence obtained from the impermissible arrest could not be used at trial because there was not sufficient intervening circumstances that would eliminate the taint caused by the Fourth Amendment violation. Respondent would urge that in the instant case, Dunaway v. New York is completely inapplicable.

Petitioner attempts to suggest that the Florida Supreme Court failed to consider Dunaway v. New York, supra, in its deliberation albeit that the Florida Supreme Court's opinion which issued was dated May 22, 1980. Respondent would submit that albeit that briefs and arguments on this issue were presented to the Florida Supreme Court prior to the rendition of Dunaway v. New York, supra, the Florida Supreme Court did not ignore Dunaway v. New York but rather found it totally inapplicable.

In the instant case, the facts reveal:

> Alachua County Deputy Sheriff Denson went on duty Saturday, at 3:30 p.m., October 23, 1976, and received a be on looklout bulletin (BOLO) with a written description and two composite sketches attached. The description and sketches were based in part on information obtained from the two young women at the Majik Market and an eyewitness account of an armed robbery which took place early Friday morning at an 8 Days Inn. At 4 p.m. that Saturday, Deputy Denson stopped opposite a car at a stop sign. The passenger in the car matched the description in the BOLO. Denson stopped the car, advised the passenger of his Miranda rights and asked him some questions. After learning that the passenger had recently been released from prison, Denson took him into custody. The passenger

was Carl Shriner.

[386 So.2d 527,528]

The court went on to note:

> Appellant presents a plethora of issues for our consideration, several of which do not merit discussion. His first colorable contention is that his arrest was illegal because of a lack of probable cause. We disagree. Law enforcement officer has probable cause to arrest if he has reasonable grounds to believe that the person arrested has committed a felony. [citation omitted] The facts constituting probable cause need not meet the standards of conclusiveness and probability required of a circumstantial fact upon which a conviction must be based. [citation omitted] Here, the sketches attached to the police BOLO bore a striking resemblance to Appellant, thus, furnishing Deputy Denson with reasonable grounds to believe that Appellant had committed the robberies.

[386 So.2d at 528]

Respondent would urge that in the instant case the officers who arrested Petitioner had probable cause to believe that he committed the robberies and murders which were under investigation and the subject matter of the BOLO which had issued by the Alachua County Sheriff's Department. This Court in Dunaway v. New York re-emphasized the requirement that police have probable cause to believe an individual has committed a crime.

> Probable cause exists where "the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that 'an offense has been or is being committed or is being committed (by the person being arrested)' Brinegar v. United States, 338 U.S. 160, 175-176, 93 L.Ed 1879, 69 S.C. 1302 (1949), quoting Carroll v. United States, 267 U.S. 132, 162, 69 L.Ed. 543, 45 S.C. 280, 39 A.L.R. 790 (1925). See, generally, 2 WLA Fave Search and Seizure: a treatise on the first amendment, 436-480 (1980)

[Footnote 9, 60 L.Ed.2d 833]

Since Dunaway v. New York has not been violated in the instant case, Respondent would urge that any statements or evidence obtained from this probable cause hit were admissible at trial and did not violate Petitioner's Fourth Amendment rights.

IV.

Petitioner lastly argues that the totality of the circumstances surrounding the obtaining of the confession herein reveals that said confession was involuntary and therefore should have been suppressed because it violated the due process clause of the Fourteenth Amendment. Respondent would disagree.

In Clewis v. Texas, 386 U.S. 707, 18 L.Ed.2d 423, (1967) this Court opined that the question for determination as to whether due process had been violated regarding the obtaining of a confession was the totality of the circumstances surrounding the giving of said confession. In Clewis v. Texas, the court found that the defendant's confession was not voluntary and therefore was not admissible into evidence. The facts of that case reveal that where there was no break in the stream of events from the time the Petitioner was first taken into custody up to the time he made his final confession nine days later, the defendant therein was denied due process of law. The court held:

> Among the factors which require our conclusion that the "confession" was not voluntary are the following: 1. During this long period of custody, Petitioner was never fully advised that he could consult counsel and have counsel appointed if necessary, that he was entitled to remain silent, and that anything he said could be used as evidence against him. [citation omitted]. Even after he was arraigned, he was not advised of his right to appointed counsel. Post-arraignment interrogation, over a period of more than a week, occurred without the presence of counsel for the accused, and without any waiver thereof.
>
> 2. The first statement was secured following a initial taking into custody which was concededly not supported by probable cause followed by 38 hours of intermittent interrogation--despite the Texas rule that an accused by taken before a magistrate "immediately". [citation omitted] This was followed by prolonged, if intermittent, interrogation by numerous officers in several buildings, punctuated by a trip to the graveside in a long trip to another town and accompanied by several polygraph tests. The police testimony makes it clear that the interrogation was not intended merely to secure information, but was specifically to elicit a signed statement of "the truth"--and the police view of the "truth" was made clear to Petitioner. The Petitioner repudiated each of the first two confessions shortly after it was made and denied the truth of the third at his trial.

> 3. The record inspires substantial concern as to the extent to which Petitioner's faculties were impaired by inadequate sleep and food, sickness, and long subjection to police custody with little or no contact with anyone other than police. This factor takes on additional weight in that Petitioner a Negro, had only a fifth grade education. He had apparently never been in trouble with the law before.
>
> [18 L.Ed.2d 427-228]

See, also, Frazier v. Cupp, 394 U.S. 731 (1969).

Respondent would urge that the due process violations enumerated in Clewis v. Texas, supra, are not evident in the case at bar. Albeit that interrogation did continue on and off for approximately a nine hour period, Petitioner was repeatedly given his Miranda warnings and Petitioner executed a waiver of rights form. There were substantial breaks in the time that interrogation took place, and as the record reflects, at the Motion to Suppress hearing, Petitioner never indicated that he completely wanted to discontinue the interrogation. Viewed in its totality, the Florida Supreme Court found that the trial court did not err in determining that the confession was voluntarily given. Petitioner has failed to make a satisfactory claim herein.

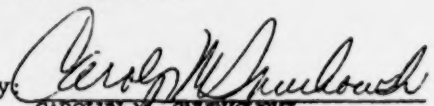
While the Florida Supreme Court's opinion did not specifically address the "totality of the circumstances" surrounding the admission of the confession, Respondent would urge that is not to say that the Florida Supreme Court did not review this issue and consider it as meritless. Respondent would urge that Petitioner has cited no authority which would support his contention that the facts and circumstances as contained in the record below require that the confession obtained be held inadmissible and a violation of Petitioner's constitutional rights occurred.

CONCLUSION

Based on the foregoing reasons, Respondent would respectfully urge that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

By: 
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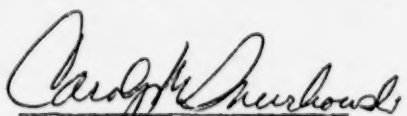
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished E. THOMAS BOYLE, 202 East Main Street, Smithtown, New York 11787, via United States mail on this 26th day of November, 1980.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